Yukilon Manufacturing Sdn Bhd & Anor v Dato' Wong Gek Meng & Ors (No 2)

HIGH COURT (JOHOR BAHRU) — CIVIL SUIT NO 22-257 OF 1996
ABDUL MALIK ISHAK J
6 JUNE 1997

Civil Procedure *— Change of solicitors — Whether 'new' solicitor had conduct of the matter without the filing of a notice of change of solicitors — Whether the filing of an action by solicitor not properly on record would render the action defective and a nullity — Rules of the High Court 1980 O 64 r 1(1)*

Civil Procedure *— Action — Title to action — Whether title to action can be changed without consent of the court — Whether action to be struck out on basis that title to the action was changed without consent of the court*

Civil Procedure *— Summons-in-chambers — Adjourned to open court — Whether matter fixed for hearing be heard in open court — Exercise of court's discretion — Rules of the High Court 1980 O 32 r 11(1)*

Civil Procedure *— Costs — Personal liability of solicitor — Dereliction of professional duty — Whether costs ought to be borne by solicitor*

In a precursor to this particular case — reported in [1997] 2 MLJ 212 — ('the first action'), the preliminary objection raised by the defendants was dismissed, the plaintiffs were represented by Messrs Gan & Lim and the defendants by Messrs Gana Muthusamy & Co. On 5 May 1997, Messrs PM Mahalingam & Co ('PM Mahalingam') filed an ex parte notice of motion ('encl 41') seeking leave of the court to cite the two counsel for the plaintiffs and the plaintiffs themselves in the first suit for contempt of court. Enclosure 41 bore the same title as in the first action but the parties therein were changed wherein the first defendant ('Dato' Wong') was named as the plaintiff and the plaintiffs in the first suit were named as the third and fourth defendant and their counsel were respectively named first and second defendant. The matter was fixed for open court on 17 May 1997. On 14 May 1997, Messrs Gan & Lim filed a summons in chambers ('encl 44') which bore the same title to the action as per the first action and prayer, inter alia, that: (i) encl 44 be struck out; and (ii) the costs for encl 44 be borne by the first defendant on a full indemnity basis. A certificate of urgency was filed together with encl 44 which prayed for encl 44 to be heard on or before the date fixed for hearing encl 41. Enclosure 44 was duly fixed to be heard on 17 May 1997 in chambers. The learned judge then showed to counsel for both parties a letter dated 8 May 1997 written on the letterhead of PM Mahalingam which alleged misdeeds by a senior assistant registrar of the High Court and the learned judge inquired as to whether the learned judge ought to continue to hear the case as a result of the letter. All the parties involved agreed that the learned judge should continue to hear encll 41 and 44. The issues which the

learned judge had to decide on were, inter alia, whether: (i) in the absence of the filing and service of a notice of change of solicitors pursuant to O 64 r 1(1) of the Rules of the High Court 1980 ('the RHC'), PM Mahalingam had the requisite authority to file encl 41; (ii) PM Mahalingam was allowed to change the title to an existing action without first obtaining prior leave of the court; (iii) encl 44 ought to be heard in open court; (iv) PM Mahalingam's ex parte summons in chambers ('encl 50') to change/replace the title of the action of encl 41 to an originating motion ought to be allowed; and (v) who was to bear the costs for encl 44. A B

Held, striking out encl 41: C

(1) In the present case, there was no change of solicitors effected by PM Mahalingam in place of Messrs Gana Muthusamy & Co, when encl 41 was filed. The words 'until the final conclusion of the cause or matter' in O 64 r 1(1) of the RHC would mean that until judgment had been worked out, Messrs Gana Muthusamy must remain on record as solicitors for the defendants unless a notice of change of solicitors was filed and served in accordance with O 64 r 1(1) of the RHC. The fact that encl 41 was filed by PM Mahalingam did not per se confer locus standi on PM Mahalingam. D

The mere filing of encl 41 by a solicitor not properly on record would render it defective. The RHC sets out the perimeters of court proceedings and all advocates and solicitors should bring themselves within the ambit and purview of it lest they fall from grace (see pp 15F–I and 20C–D); *Bagley v Maple & Co Ltd* (1911) 27 TLR 284 followed. E F

(2) The discretion accorded in O 32 r 11(1) of the RHC must be exercised according to common sense and justice. Enclosure 44 is related to encl 41 and both enclosures had been fixed to be heard on the same day and it would be convenient to proceed to open court to dispose of both enclosures. Therefore, this was a fit case for encl 44 to be heard in open court (see pp 17I and 18A–D). G

(3) It was apparent that PM Mahalingam had distorted the whole action and changed the status of the parties without an order of the court. This was a case of changing the character of one suit to another without an order of the court and was a classic case wherein the RHC was thrown to the wind. Therefore, encl 41 had no place in these proceedings and must be struck out forthwith (see p 19E–G); *Sykt Joo Seng & Anor v Habib Bank Ltd* [1986] 2 MLJ 129 distinguished. H

(4) It was obvious that encl 50 was filed as an afterthought. When the court heard submissions in regards to encll 41 and 44, PM Mahalingam realized the importance of the prayers in encl 44 which if successful would dispose of encl 41 forever. To circumvent this, encl 50 was filed solely to pre-empt encl 44. I

This was conduct unbecoming of a member of the Bar (see p 18F–G).

(5) The discretion to grant costs must be exercised judicially and according to the rules of reason and justice. In this case, there were materials available for the court's discretion to be exercised in awarding costs to the successful party without having to hear fresh viva voce evidence for the purpose of determining costs and it was fitting that Dato' Wong personally be ordered to pay costs on a full indemnity basis to the plaintiffs (see pp 20H–I and 22G).

[Bahasa Malaysia summary

Dalam pelopor kes ini — yang dilaporkan dalam [1997] 2 MLJ 212 — ('tindakan pertama'), bantahan permulaan yang dibangkitkan oleh defendan-defendan telah ditolak, plaintif-plaintif diwakili oleh Tetuan Gan & Lim dan defendan-defendan oleh Tetuan Gana Muthusamy & Co. Pada 5 Mei 1997, Tetuan PM Mahalingam & Co ('PM Mahalingam') memfailkan suatu notis usul ex parte ('lampiran 41') meminta kebenaran mahkamah untuk menyebut dua peguam plaintif-plaintif dan plaintif-plaintif sendiri dalam guaman pertama untuk penghinaan mahkamah. Lampiran 41 membawa tajuk yang sama seperti dalam tindakan pertama tetapi pihak-pihak di dalamnya ditukar dalam mana defendan pertama ('Dato' Wong') dinamakan sebagai plaintif dan plaintif-plaintif dalam guaman pertama dinamakan sebagai defendan ketiga dan keempat dan peguam mereka dinamakan sebagai defendan pertama dan kedua masing-masing. Hal itu ditetapkan untuk mahkamah terbuka pada 17 Mei 1997. Pada 14 Mei 1997, Tetuan Gan & Lim memfailkan suatu saman dalam kamar ('lampiran 44') yang membawa tajuk yang sama dengan tindakan seperti tindakan pertama dan permohonan, antara lain, bahawa: (i) lampiran 44 dibatalkan; dan (ii) kos-kos untuk lampiran 44 ditanggung oleh defendan pertama pada dasar tanggung rugi penuh. Perakuan tindakan segera difailkan bersama lampiran 44 yang memohon supaya lampiran 44 didengar pada atau sebelum tarikh yang ditetapkan untuk pembicaraan lampiran 41. Lampiran 44 ditetapkan untuk dibicarakan pada 17 Mei 1997 dalam kamar. Hakim yang arif kemudiannya menunjukkan kepada peguam kedua-dua pihak sepucuk surat bertarikh 8 Mei 1997 yang ditulis atas kepala surat PM Mahalingam yang mengatakan kesalahan oleh seorang penolong kanan pendaftar Mahkamah Tinggi dan hakim yang arif bertanya tentang sama ada beliau patut terus mendengar kes akibat surat itu. Kesemua pihak yang terlibat bersetuju bahawa hakim patut terus mendengar lampiran 41 dan 44. Isu-isu yang harus diputuskan oleh hakim yang arif adalah, antara lain, sama ada: (i) dalam ketiadaan pemfailan dan penyampaian notis tentang penukaran peguamcara menurut A 64 k 1(1) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'), PM Mahalingam mempunyai kuasa yang diperlukan untuk memfailkan lampiran 41; (ii) PM Mahalingam dibenarkan menukar tajuk tindakan yang wujud tanpa memperolehi kebenaran terdahulu

daripada mahkamah; (iii) lampiran 44 patut didengar di mahkamah terbuka; (iv) saman dalam kamar ex parte PM Mahalingam ('lampiran 50') untuk menukar/mengganti tajuk tindakan lampiran 41 kepada usul pemula patut dibenarkan; dan (v) siapakah harus menanggung kos untuk lampiran 44. A

Diputuskan, membatalkan lampiran 41: B

(1) Dalam kes ini, tiada penukaran peguamcara yang dilakukan oleh PM Mahalingam sebagai ganti Messrs Gana Muthusamy & Co, apabila lampiran 41 difailkan. Perkataan-perkataan 'sehingga berakhir dengan muktamadnya kausa atau perkara itu' dalam A 64 k 1(1) KMT bermakna bahawa sehingga penghakiman C diselesaikan, Tetuan Gana Muthusamy mesti kekal atas rekod sebagai peguamcara untuk defendan-defendan melainkan notis penukaran peguamcara difailkan dan disampaikan menurut A 64 k 1(1) KMT. Fakta bahawa lampiran 41 difailkan oleh PM Mahalingam tidak mengurniakan locus standi per se pada D PM Mahalingam.

Pemfailan lampiran 41 semata-mata oleh seorang peguamcara yang tidak tercatat pada rekod dengan wajarnya akan menjadikannya cacat. KMT menyatakan sempadan prosiding mahkamah dan semua peguambela dan peguamcara haruslah membawa diri mereka dalam lingkungan dan skopnya supaya E tidak terkeluar dari adab (lihat ms 15F–I dan 20C–D); *Bagley v Maple & Co Ltd* (1911) 27 TLR 284 diikut.

(2) Budi bicara yang dianugerahkan dalam A 32 k 11(1) KMT mestilah dilaksanakan menurut akal dan keadilan. Lampiran 44 adalah berkaitan dengan lampiran 41 dan kedua-dua lampiran F telah ditetapkan untuk dibicarakan pada hari yang sama dan adalah mudah untuk terus ke mahkamah terbuka bagi menyelesaikan kedua-dua lampiran. Maka, ini merupakan kes yang wajar untuk lampiran 44 dibicarakan di mahkamah terbuka (lihat ms 17I dan 18A–D). G

(3) Adalah nyata bahawa PM Mahalingam telah memutarbelitkan keseluruhan tindakan dan menukar taraf pihak-pihak tanpa perintah mahkamah. Ini merupakan kes menukar sifat suatu guaman kepada yang lain tanpa satu perintah mahkamah dan adalah kes klasik di mana KMT tidak dihiraukan. Maka, lampiran 41 tidak mempunyai kedudukan dalam prosiding ini H dan mesti dibatalkan dengan serta merta (lihat ms 19E–G); *Sykt Joo Seng & Anor v Habib Bank Ltd* [1986] 2 MLJ 129 dibeza.

(4) Adalah jelas bahawa lampiran 50 difailkan sebagai tambahan. Apabila mahkamah mendengar hujah-hujah berkenaan lampiran 41 dan 44, PM Mahalingam menyedari kepentingan I permohonan dalam lampiran 44 yang mana jika berjaya akan menghapuskan lampiran 41 selama-lamanya. Untuk menyekat ini, lampiran 50 difailkan semata-matanya untuk membantut

lampiran 44. Ini merupakan kelakuan yang tidak wajar bagi seorang ahli Badan Peguam (lihat ms 18F–G).

(5) Budi bicara untuk membenarkan kos mestilah dilaksanakan secara adil dan menurut kaedah-kaedah akal dan keadilan. Dalam kes ini, terdapat material untuk pelaksanaan budi bicara mahkamah dalam mengawardkan kos kepada pihak yang berjaya tanpa perlu mendengar keterangan viva voce yang baru untuk tujuan menentukan kos dan adalah wajar bahawa Dato' Wong sendiri diperintahkan membayar kos pada dasar tanggung rugi penuh kepada plaintif-plaintif (lihat ms 20H–I dan 22G).]

Notes

For a case on adjournment to open court, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) para 3528.

For cases on personal liability of solicitor, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 945–950.

Cases referred to

Annison & Ors v District Auditor for St Prancras Borough Council & Anor [1962] 1 QB 489 (refd)

Attorney General, Malaysia v Manjeet Singh Dhillon [1991] 1 MLJ 167 (refd)

Bagley v Maple & Co Ltd (1911) 27 TLR 284 (follld)

Berry v British Transport Commission [1962] 1 QB 306 (refd)

Bevington v Perks (The Bell Assurance Society, Third Party) [1925] 2 KB 229 (refd)

Canopee Investment Pte Ltd & Ors v Landmarks Holdings Bhd & Ors [1989] 2 MLJ 469 (refd)

Callow v Young (1886) 55 LT 543 (refd)

Civil Service Co-operative Society, The v General Steam Navigational Co, The [1903] 2 KB 756 (refd)

Chan Sang & Anor v Golden Century Development Sdn Bhd & Anor and other actions [1995] 1 MLJ 92 (refd)

Edwards v Edwards [1958] P 235 (refd)

Hardie and Lane v Chiltern (1927) 43 TLR 477 (refd)

Hisham, Sobri & Kadir (suing as a firm) v Lim Chau Seng & Anor [1987] 2 MLJ 387 (refd)

Hock Hua Bank (Sabah) Bhd v Yong Liuk Thin & Ors [1995] 2 MLJ 213 (refd)

Insas Bhd & Anor v Ayer Molek Rubber Co Bhd & Ors [1995] 2 MLJ 833 (refd)

Karpal Singh v Atip bin Ali [1987] 1 MLJ 291 (refd)

Kierson v Joseph L Thompson & Sons Ltd [1913] 1 KB 587 (refd)

Lady de la Pole v Dick [1885] 29 Ch D 351 (refd)

Lee v Bude, etc Ry (1871) LR 6 CP 576 (refd)

Lim Nyook Yin v Ultratech Sdn Bhd & Anor [1995] 1 MLJ 498 (refd)

Malaysian Bar v Tan Sri Dato Abdul Hamid bin Omar [1989] 2 MLJ 281 (refd)

Malaysian International Merchant Bankers Bhd v Highland Chocolate & Confectionery Sdn Bhd & Anor [1997] 1 MLJ 102 (refd)
Mayor of Bristol v GW Ry [1916] WN 47 (refd)
Ritter v Godfrey [1920] 2 KB 47 (refd)
Sinnathamby & Anor v Lee Chooi Ying; Brijkishore & Anor v Lee Chooi Ying [1987] 1 MLJ 110 (refd)
Susannah Sharp v Wakefield [1891] AC 173 (refd)
Sykt Joo Seng & Anor v Habib Bank Ltd [1986] 2 MLJ 129 (distd)
Universal Cargo Carriers v Citati [1957] WLR 979 (refd)
Yukilon Manufacturing Sdn Bhd & Anor v Dato Wong Gek Meng & Ors [1997] 2 MLJ 212 (refd)

Legislation referred to

Courts of Judicature Act 1964 ss 13(2), 68(2)
Legal Profession Act 1976 s 99(2)
Legal Profession (Practice and Etiquette) Rules 1978 rr 49, 60A
Rules of the High Court 1980 O 29 r 1 (2B), O 32 r 11(1), O 52 r 2(1), (2), O 64 r 1(1), Form 138

Enclosure 41
PM Mahalingam (*PM Mahalingam & Co*) for the applicants.
Yusof Khan bin Ghows Khan (*Gan & Lim*) for the respondents.

Enclosure 44
Yusof Khan bin Ghows Khan, *M Pathmanathan* and *Gan Techiong* (*Gan & Lim*) for the plantiffs.
R Jayabalan (*Gana Muthusamy & Co*) for the defendants.

Enclosure 50
PM Mahalingam (*PM Mahalingam & Co*) for the applicants.

Abdul Malik Ishak J: On 21 January 1997, Mr Gana Muthusamy from Messrs Gana Muthusamy & Co and assisted by Mr Hardip Singh appeared for all the four defendants while the plaintiffs were represented by Mr M Pathmanathan and Mr Gan Techiong from Messrs Gan & Lim. On that day, Mr Gana Muthusamy raised a preliminary objection which eventually was dismissed by me with costs. A written judgment on that preliminary objection had been written and circulated to all the parties. That written judgment has since been reported vide *Yukilon Manufacturing Sdn Bhd & Anor v Dato Wong Gek Meng & Ors* [1997] 2 MLJ 212. On receipt of the written judgment, Mr Gana Muthusamy filed a notice of appeal dated 22 March 1997 as reflected in encl 32. By letter dated 5 May 1997, Mr Gana Muthusamy enclosed an undated notice of withdrawal of that appeal. That was a wise move.

On 5 May 1997, Mr PM Mahalingam from Messrs PM Mahalingam & Co filed an ex parte notice of motion in encl 41 which bore the following title:

In the High Court of Malaya Holden at Johor Bahru

A Civil Suit No 22–257–1996

Between

Dato' Wong Gek Meng, JP ... Applicant/Plaintiff

B And

(1) Pathmanathan a/l Mylvaganam
(2) Gan Techiong
(3) M Sakamoto
(4) Makoto Togase ... Respondents/Defendants

C To put matters in perspective, it would be useful to set out the prayers sought for in encl 41. It was worded thus:

(a) bahawa pemohon/plaintif diberi kebenaran dari mahkamah yang mulia ini suatu perintah penghakiman terhadap penentang/defendan-defendan;

(b) kos permohonan ini dijadikan kos dalam kausa; dan

D (c) relief atau perintah-perintah seterusnya yang mahkamah yang mulia ini fikir sesuai dan berpatutan.

In a nutshell, encl 41 was an application by Dato' Wong Gek Meng JP for leave to cite Pathmanathan a/l Mylvaganam, Gan Techiong, M Sakamoto and Makoto Togase for contempt under O 52 r 2(1) of the Rules of the E High Court 1980 ('the RHC'). The application in encl 41 was supported by a statement setting out the name and description of the applicant, the names, descriptions and addresses of the persons sought to be committed together with the grounds on which the committal was sought. It was also supported by an affidavit of Mr PM Mahalingam verifying the facts relied F upon. There was thus compliance of O 52 r 2(2) of the RHC.

In open court, Mr Gan Techiong submitted bluntly that they were not served with encl 41 but all the same they obtained it through the court file after paying a praecipe of RM35.

It is interesting to note that the affidavit of Mr PM Mahalingam in G support of encl 41 made reference to a letter from Messrs PM Mahalingam & Co, dated 27 March 1997 marked as exh 'PM9'. That letter intimated a desire to file court proceedings for damages in the tune of RM5m for defamation purportedly committed by Pathmanathan a/l Mylvaganam, Gan Techiong, M Sakamoto and Makoto Togase unless they agree to publish an apology in *The New Straits Times* in the form and manner to be H approved by the solicitors of Dato Wong Gek Meng JP in order to mitigate the damages. Exhibit 'PM9' entitled 'Publication of Libellous Statements, letter dated 7 December 1996 addressed to M/s Gan & Lim from Mr M Sakamoto and Mr Makoto Togase' and this must be the letter that incurred the wrath of Dato' Wong Gek Meng JP. The statement in I support of encl 41 produced in verbatim the letter dated 7 December 1996 and to put matters in perspective, that letter should be reproduced. That letter was worded in this way:

7 December 1996

M/s Gan & Lim,
Advocates & Solicitors,
61, Jalan Tan Hiok Nee,
80000 Johor Bahru,
Johor Malaysia.

Dear Sirs,

Re: Court proceedings against Dato' Wong Gek Meng, Mr Wong Geok Cheong and Supertex Mfg Sdn Bhd

We refer to our meetings about the above matter.

We understand that the one and only way to preserve evidence of breach of fiduciary duties and breach of trust against our director Dato' Wong Gek Meng and General Manager Wong Geok Cheong is to apply for what your Mr Gan Techiong called [an] Anton Piller order. If Dato' Wong and his brother know about our application early, they would definitely move everything away, or even destroy evidence. So, it is very important that they must not know about the court proceedings at this stage.

We confirm that our company must sue Dato' Wong, Mr Wong Geok Cheong and Supertex Mfg Sdn Bhd as soon as possible and for that purpose we appoint you as our solicitors.

Please proceed as soon as possible.

Thank you.

Yours faithfully,

Sgd	Sgd
.....	.....
M Sakamoto	Makoto Togase
Director	Director

Incidentally, this very letter formed part and parcel of the judgment that was reported in *The Malayan Law Journal* (see pp 217–218 of the report). Be that as it may, encl 41 was fixed for hearing in open court on 17 May 1997.

On 14 May 1997, Messrs Gan & Lim filed a summons-in-chambers in encl 44 which bore the following title:

In the High Court of Malaya Holden at Johor Bahru
Civil Suit No 22–257–1996

Between

(1) Yukilon Manufacturing Sdn Bhd
(2) Yukigaya Chemical Industry Co Ltd ... Plaintiffs

And

(1) Dato' Wong Gek Meng
(2) Wong Geok Cheong
(3) Supertex Industries Sdn Bhd
(4) Supertex Mfg Sdn Bhd ... Defendants

A Enclosure 44 was supported by a 'perakuan segera' in encl 43 and it was worded thus:

> Kami, selaku peguamcara plaintif-plaintif dalam tindakan di atas dengan hormatnya mengesahkan bahawa permohonan plaintif-plaintif yang difailkan bersama perakuan segera ini harus didengar pada hari Sabtu 17 Mei 1997
B bersama dengan, atau sebelum pendengaran usul (kand 41) kerana ia adalah untuk membatalkan usul tersebut. Kami memohon agar permohonan plaintif-plaintif ditetapkan untuk pendengaran pada 17 Mei 1997.
>
> Bertarikh pada 14 Mei 1997
>
> tt
C .....
> Peguamcara plaintif-plaintif

Enclosure 44 was also supported by an affidavit of Mr Gan Techiong that was affirmed on 14 May 1997 and filed on the same date as can be seen in encl 45. Both encll 43 and 45 bore the same title as that of encl 44. It
D is germane to set out the prayers sought for in encl 44. They were worded thus:

> (a) the first defendant's application made by way of motion (encl 41) dated 5 May 1997 for leave of court to commence committal proceedings against the plaintiffs' counsel M Pathmanathan and Gan Techiong and two of the first plaintiff's directors Mitsuhiko Sakamoto and Makoto
E Togase be struck out;
>
> (b) the first defendant whether by himself, his solicitors, counsel, agent or servant or howsoever be restrained from instituting any further or other legal proceedings against the plaintiffs' counsels Gan Techiong and M Pathmanathan and the first plaintiffs' directors Mitsuhiko Sakamoto
F and Makoto Togase in connection with or related to these proceedings and/or to the letter dated 7 December 1996 written by the first plaintiff to its solicitors Messrs Gan & Lim which was signed by the said Mitsuhiko Sakamoto and Makoto Togase, save by leave of this honourable court;
>
> (c) costs of this application on a full indemnity basis to be paid by the first
G defendant to the plaintiffs; and
>
> (d) other relief or order deem fit by this honourable court.

As requested, encl 44 was fixed for hearing in chambers on 17 May 1997.

In open court, encl 41 came up for hearing on 17 May 1997. Mr M Pathmanathan and Mr Gan Techiong appeared for Yukilon
H Manufacturing Sdn Bhd and Yukigaya Chemical Industry Co Ltd whom Mr M Pathmanathan described as the real plaintiffs. Mr M Pathmanathan also informed the court that the real defendants were Dato' Wong Gek Meng, Wong Geok Cheong, Supertex Industries Sdn Bhd and Supertex Mfg Sdn Bhd. It is apparent that Mr M Pathmanathan was referring to the
I parties named therein in encl 44. Mr PM Mahalingam introduced himself in open court as counsel for Dato' Wong Gek Meng JP in regard to encl 41. Mr Yusof Khan bin Ghows Khan introduced himself in open court as counsel for all the respondents/defendants in encl 41, namely Pathmanathan a/l Mylvaganam, Gan Techiong, M Sakamoto and Makoto

Togase. Mr Yusof Khan submitted that he was instructed to oppose the application in encl 41 by the respondents in encl 41 and also by the plaintiffs in encl 44. Mr Yusof Khan further submitted that though encl 44 was fixed for hearing in chambers, I could order that it be heard in open court by reason of its importance under O 32 r 11(1) of the RHC. Flowing from this, it was submitted by Mr Yusof Khan that encl 44 should be heard in open court before the hearing of encl 41. Thus, if encl 44 was successful, there was no necessity to hear encl 41. In response, Mr PM Mahalingam submitted that encl 41 that was filed for hearing in open court merely sought leave, a mandatory requirement under O 52 r 2(1) of the RHC. I am aware of the decision of Abdul Malek Ahmad J (as he then was) in *Chan Sang & Anor v Golden Century Development Sdn Bhd & Anor and other actions* [1995] 1 MLJ 92 where his Lordship dissected O 52 of the RHC and gave his learned views. The headnote of the report merits reproduction and for clarity it is now reproduced:

(2) An order of committal can only be made by a judge of the High Court under O 52 r 1 and, as such, applications for leave under O 52 r 2(1) must be made to a judge of the High Court as the word 'Court' in O 52 r 2(1) must mean a judge of the High Court. Furthermore, the word 'motion' in O 52 r 3(1) clearly denotes that the application for leave must be made to a judge of the High Court in open court and not in chambers.

(3) Although O 52 r 2(2) states that applications for leave may be made to a judge in chambers when the court is in vacation, the word 'Court' in O 52 r 2(2) does not include the registrar as it would be illogical to require applications for leave to be made to the judge in chambers only during court vacations while at other times, the applications may be made to the registrar.

(4) The application for leave under O 52 should have been to a judge in open court when the High Court was in session or to a judge in chambers if it was in vacation and not to the registrar in chambers as in this case. As the registrar had no jurisdiction to deal with the matter, the leave obtained could not be a 'proceeding' under O 2 r 1(1) and was not a mere irregularity but a nullity.

His Lordship Abdul Malek Ahmad J in erudite terms said at p 99 of the report:

> On these considerations, I can only conclude that the application for leave under the Order had been wrongly made as it should have been to a judge in open court when the High Court was in session or to a judge in chambers if it is in vacation and not to the registrar in chambers as what had happened in this case. To my mind, the application for leave is the root of the committal proceedings and any non-compliance of the procedure prescribed cannot merely amount to an irregularity but it would actually nullify the proceedings.

My attention was drawn to the case of *Lim Nyook Yin v Ultratech Sdn Bhd & Anor* [1995] 1 MLJ 498 which construed O 29 r 1(2B) of the RHC and by necessity has no relevance to the application for leave under O 52 r 2(1) of the RHC. There I said (see p 502 of the report):

In my judgment, time is mandatorily set out in O 29 r 1(2B) of the RHC and the court has no power to extend time. Thus, an interim injunction granted ex parte would lapse after two weeks in the absence of any application to revoke it or to set it aside (*Tan Kim Seng v Tan Kim San* [1994] 3 CLJ 671). It is quite obvious that O 29 r 1(2B) of the RHC is inserted to curtail the life-span of an ex parte interim injunction.

Reverting back to the mainstream of the case, I had to show to both Mr M Pathmanathan and Mr Gan Techiong a letter written by Mr PM Mahalingam using the letterhead of the law firm of Messrs PM Mahalingam & Co. That letter was dated 8 May 1997 and it alleged misdeeds by one of the senior assistant registrars of the High Court, Johor Bahru. I do not propose to go into the merits of that letter except to say that it was unsavoury. It was written in bad taste. It reflected the uncouth behaviour of the writer. Totally uncultured. The tenor of that letter sought to undermine the administration of justice and I enquired of Mr PM Mahalingam, Mr M Pathmanathan and Mr Gan Techiong whether I should proceed to hear encll 41 and 44. I adjourned the case for a short while to enable Mr M Pathmanathan and Mr Gan Techiong to read the letter dated 8 May 1997 which I handed to them in open court. On resumption, Mr M Pathmanathan after returning the letter dated 8 May 1997 to me proceeded to address the court and briefly this was what he said:

> We have sight of the letter dated 8 May 1997 the contents of which are shocking. It is trite that aggrieved parties have recourse as provided under the law and the rules of the court. It is not a procedure to send a written complaint of this nature ... . Every judicial officer in this country however low in the hierarchy possesses independent powers and he cannot be directed even by his superiors on how to decide in a given matter. It is abundantly clear that the first defendant [referring to Dato' Wong Gek Meng] is trying to deter and frighten us from continuing to discharge our duties. We thought we were the only ones whom the first defendant [referring to Dato' Wong Gek Meng] is trying to deter; this letter shows that they are taking a step further to deter a judicial officer ... . We know that any decision made by a judicial officer is privileged and everything that transpires in the course of judicial proceeding is privileged primarily to protect judicial officers of the court from discharging their duties without fear. ... It is not for the parties when the going are extraneous to take steps to instigate YA to disqualify yourself.

For my part, I have nothing useful to add to what Mr M Pathmanathan had said in regard to the letter dated 8 May 1997. I am reminded of the case of *Insas Bhd & Anor v Ayer Molek Rubber Co Bhd & Ors* [1995] 2 MLJ 833 where Eusoff Chin Chief Justice succinctly observed (at p 841):

> ... It is judicially recognized that judicial pronouncements should be judicial in nature and not depart from sobriety, moderation, and reserve. It has been said elsewhere that the pen of a judge should be like the knife of a surgeon which probes into the flesh only as much as is absolutely necessary for the purpose of the case before it. A judge should neither reward virtue nor chastise vice, and his judgment should not display emotion and intemperance as displayed in the judgment of the Court of Appeal here.

In another part of the judgment, his Lordship Eusoff Chin Chief Justice continued in serious vein (at p 844): A

> Judges and magistrates must not only act neutral and fair, but be seen to act so. They should not jump into the arena and do battles with the parties, lest they may be blinded by the dust of the battle.

Finally, his Lordship Eusoff Chin Chief Justice gave this piece of advice (at p 846): B

> We wish to remind judges and magistrates that where they find that an advocate handling any matter before them has grossly abused the process of court or acted in a highly unethical manner, the proper step to be taken is for them to lodge a report with the Legal Profession Disciplinary Board established under s 99(2) of the Legal Profession Act 1976, which will investigate the complaint and where both the accuser and the accused will be given a fair opportunity to state their cases. C

By way of a per incuriam, Gopal Sri Ram JCA, in *Hock Hua Bank (Sabah) Bhd v Yong Liuk Thin & Ors* [1995] 2 MLJ 213 had this to say in regard to an allegation of bias against a judge (at p 220): D

> ... In my judgment, it is a most serious matter to allege bias against a judge whose sole function is to decide a case according to the evidence before him. I notice an unhealthy trend of late to allege bias too readily against a judicial arbiter on insufficient material. Nothing is capable of eroding public confidence in the judicial arm of the state than unwarranted and unfounded allegations of bias. It is therefore to be avoided at all costs if necessary, by having resort to the power to punish for contempt. E

Mr M Pathmanathan submitted that both he and Mr Gan Techiong have full confidence that I should continue hearing the case. Mr PM Mahalingam echoed the same sentiments and this was what he said: F

> I now say that I certainly have faith and confidence in YA to hear the case. I prefer YA to continue hearing the case. I have full confidence in YA.

It is interesting to note that Mr R Jayabalan from Messrs Gana Muthusamy & Co admitted that on record, Messrs Gana Muthusamy & Co were the solicitors for the defendants in Civil Suit No 22–257–1996 and by this he meant Dato' Wong Gek Meng, Wong Geok Cheong, Supertex Industries Sdn Bhd and Supertex Mfg Sdn Bhd. Mr R Jayabalan was bold enough to assert that Messrs Gan & Lim served encl 44 to Messrs Gana Muthusamy & Co, even though the latter was not involved in the committal proceedings. It was Mr R Jayabalan's stand that encl 44 should not have been served on Messrs Gana Muthusamy & Co. Mr M Pathmanathan retorted that they had to serve encl 44 to Messrs Gana Muthusamy & Co because the latter were the solicitors on record. Mr Yusof Khan submitted that encl 44 was served on Mr PM Mahalingam because they proposed to apply that costs be personally borne by Mr PM Mahalingam in reference to encl 41. G H I

Mr PM Mahalingam referred to the letter dated 8 May 1997 and he sought to justify it. He said that that letter, in chronological order, sets out the sequence of events. I do not propose, at this juncture, to harp on that

letter and I now proceed to the other points addressed by Mr PM Mahalingam. I need to emphasize that at no point of time did Mr PM Mahalingam deny writing that infamous letter dated 8 May 1997. The irresistible inference to be arrived at was that that letter dated 8 May 1997 was authored by Mr PM Mahalingam. Be that as it may, no amount of denial, if any, could exculpate Mr PM Mahalingam's authorship of the letter dated 8 May 1997.

In regard to encl 41, Mr PM Mahalingam argued that it should have been renumbered. By this he must have meant that encl 41 should not be numbered as it were, namely, Civil Suit No 22–257–1996. He submitted that encl 41 should be heard forthwith and that the opposing parties have no right to be heard until this court gave leave in regard to encl 41. It was Mr PM Mahalingam's submission that the opposing parties acknowledged his role as solicitor and counsel for the defamation suit since all the defamation papers were served on him. Mr PM Mahalingam admitted that encl 44 was served on him and that Messrs Gana Muthusamy & Co were not involved in the defamation case. Reliance was placed on the case of *Hisham, Sobri & Kadir (suing as a firm) v Lim Chau Seng & Anor* [1987] 2 MLJ 387 where the contempt proceedings went by way of an originating motion and not by way of the original civil suit number, yet it received the judicial approval of Mohamed Dzaiddin J (as he then was). This was what his Lordship said (at p 389) :

> Finally, there was a third objection raised by Mr Annamalai where he submitted that based on the true construction of O 52 r 1(2)(a)(ii) Rules of the High Court, this application ought to have been heard by the High Court which granted the injunction order, ie Court No 1. Counsel also submitted that the contempt proceeding should have been commenced in the same Civil Suit No 428 of 1986 and not by a separate originating motion. Without wasting much time, in my opinion, there is no merit in his objection because we are all fully aware that this court is a court of competent jurisdiction and is empowered to try and punish any contempt of itself under s 13(2) of the Courts of Judicature Act 1964.

As I understood Mr PM Mahalingam, it was because of the case of *Hisham, Sobri & Kadir (suing as a firm) v Lim Chau Seng & Anor* that he proceeded to use the same civil suit number for encl 41 and that was No 22–257–1996. Accordingly, he submitted that this court was empowered to hear encl 41 and grant the leave that was sought for. By way of an analogy, reference was also made to *Attorney General, Malaysia v Manjeet Singh Dhillon* [1991] 1 MLJ 167 (SC), where the Attorney General applied by way of a Civil Application No 08–26–1989 to commit the respondent there to prison for alleged contempt of court. With respect, the mode of filing was not in dispute in the case of *Attorney General, Malaysia v Manjeet Singh Dhillon* as was the case in the present proceedings. Next, Mr PM Mahalingam argued that the service of encl 44 fall short of the clear two days and when it dawned on him that he had to submit on the implications of O 32 r 11(1) of the RHC, he swiftly applied for an adjournment. He relented and urged this court to grant an adjournment for submissions in regard to encll 41 and 44.

Mr Yusof Khan replied and he took exception to what Mr PM Mahalingam said in regard to the question of service of encl 44. A strenuous argument was launched by Mr Yusof Khan and it was his stand that encl 44 was rightly served on Messrs Gana Muthusamy & Co, who were the solicitors on record for Dato' Wong Gek Meng as it was the latter who instituted the committal proceedings. An argument was advanced to the effect that the committal proceedings were grounded on a wrong footing and it was for this reason that the parties were before this court vide encl 44 to have encl 41 struck out forthwith. Mr Yusof Khan argued that it was not open for Mr R Jayabalan to disclaim having anything to do with encl 41 because Messrs Gana Muthusamy & Co were the solicitors on record and they must necessarily be served with encl 44 and that service was effected on 14 May 1997. In so far as the service of encl 44 on Mr PM Mahalingam was concerned, it was submitted by Mr Yusof Khan that that service was meant to move this honourable court to order Mr PM Mahalingam personally liable to bear the costs in reference to encl 41 as Mr PM Mahalingam obviously had no standing at all. Mr Yusof Khan puts it rather well when he submitted that this court should hear encl 44 first because that would nail the coffin of encl 41 and buried it forever.

Mr M Pathmanathan argued that both he and Mr Gan Techiong took encl 41 seriously. He said as officers of the court, the granting of leave for them to be condemned for contempt would be a most shameful act. He proceeded to argue that the mere granting of leave would give rise to this kind of implication. My attention was drawn to encl 45 and that enclosure makes for interesting reading. It was deposed in encl 45 that Dato' Wong Gek Meng had on 9 April 1997 filed a civil suit claiming, inter alia, RM5m damages against Mr M Pathmanathan, Mr Gan Techiong, Mitsuhiko Sakamoto and Makoto Togase vide Johor Bahru High Court Civil Suit No 22–79–1997. The application to strike out Dato' Wong Gek Meng's action under O 18 r 19 of the RHC by the aggrieved parties have since been filed. What is distressing is the averment in encl 45 that Mr PM Mahalingam had caused parts of the statement of claim in Civil Suit No 22–79–1997 to be published in *The New Straits Times* on 13 April 1997. It was reported that Mr PM Mahalingam spoke directly to the press and *The New Straits Times* report as exhibited in 'GT5' bore out this fact. *The New Straits Times* report bore the caption: 'Businessman files suit for RM5m compensation' and for convenience certain passages as reported would now be reproduced:

> A businessman is suing two lawyers and two Japanese factory directors asking for compensation amounting to RM5m over alleged libellous contents of a letter.

The letter referred to therein was none other than the letter dated 7 December 1996 which was reproduced in the early part of this judgment. *The New Straits Times* report further carried this story:

> Subsequently, a letter purported to have been written in January by the two lawyers, who represented Sakamoto and Togase, stated that Wong and Gek Cheong 'would definitely remove everything away or even destroy evidence

A ... so, it is very important that they must not know about the court proceedings at this stage'.

The last two paragraphs of *The New Straits Times* report carried this legend:

B Mahalingam said the words in the letter had painted a bad picture about Wong and his brother.

He said the words implied that the plaintiff was of ill-repute, poor character, a liar, untrustworthy, behaved like a criminal and would even go to the extent of destroying documents.

C What Mr PM Mahalingam did was said to run counter to rr 49 and 60A of the Legal Profession (Practice and Etiquette) Rules 1978. It was deposed that what Dato' Wong Gek Meng and Mr PM Mahalingam did were entirely motivated by malice and spite and the crave for publicity were meant to put Mr M Pathmanathan, Mr Gan Techiong, Mitsuhiko Sakamoto and Makoto Togase in bad light and damage to their reputation especially D the professional capacity of the two lawyers. It was deposed further that the real purpose of embarking on this course of conduct was not to serve the ends of justice but rather actuated by Dato' Wong Gek Meng's deep seated malice and viciousness and possibly to try to avenge Wong Geok Cheong who was charged by the police under s 408 of the Penal Code on 10 April 1997 for criminal breach of trust.

E Mr M Pathmanathan strenously argued that in the event encl 41 was allowed, it would cause irreparable damage. It was his argument, quite rightly, that until and unless a notice of change of solicitors was filed and served in accordance with O 64 r 1(1) of the RHC, Messrs Gana Muthusamy & Co shall remain on record as solicitors for Dato Wong Gek F Meng. The fact that encl 41 was filed by Mr PM Mahalingam did not per se give him locus standi. Order 64 r 1(1) of the RHC reads thus:

A party to any cause or matter who sues or defends by a solicitor may change his solicitor without an order for that purpose but, unless and until notice of the change is filed and served in accordance with this rule, the G former solicitor shall, subject to rules 4 and 5, be considered the solicitor of the party until the final conclusion of the cause or matter, in the High Court,

and the language employed therein is quite clear and unambiguous. It means this. So long as Messrs Gana Muthusamy & Co remains as the solicitor on record, the service of encl 44 on that solicitor is said to be good H service. Cases like *Lady de la Pole v Dick* (1885) 29 Ch D 351 and *Callow v Young* (1886) 55 LT 543 all establish the same principle and that is this: service on the solicitor on record is considered good service. In the present case, there was no change of solicitors effected by Messrs PM Mahalingam & Co in place of Messrs Gana Muthusamy & Co when encl 41 was filed. I Thus, the words 'until the final conclusion of the cause or matter' appearing in O 64 r 1(1) of the RHC would mean that until judgment has been worked out, Messrs Gana Muthusamy & Co must remain on record as solicitors for Dato Wong Gek Meng, Wong Geok Cheong, Supertex Industries Sdn Bhd and Supertex Mfg Sdn Bhd (*Bagley v Maple & Co Ltd*

(1911) 27 TLR 284 and *Lady de la Pole v Dick*). I did say in *Malaysian International Merchant Bankers Bhd v Highland Chocolate & Confectionery Sdn Bhd & Anor* [1997] 1 MLJ 102 that (at p 105): A

> ... the RHC has the force of law and it should not be ignored or overlooked. The observance of the RHC is therefore of considerable importance in litigation and it is the mark of a skilful and experienced lawyer to know how best to employ the rules for the practical and tactical advantage of his client. The general purpose of the rules as exemplified in the RHC is to assist the parties in achieving justice and they are not meant, as some lawyers thought, to be the mechanism for disciplining either the parties or their solicitors. B

It was a correct assertion by Mr M Pathmanathan when he submitted that Mr PM Mahalingam had restructured the title to the action as reflected in encl 41 without an order of the court. The names of the parties in encl 41 were entirely changed, different from that of encl 44. Be that as it may, Mr PM Mahalingam prayed for an adjournment as he wanted to do research in regard to O 32 r 11(1) especially on the point as to whether encl 44 be heard in open court. An adjournment was duly granted and the hearings for encll 41 and 44 were scheduled on 30 and 31 May 1997. C D

On 23 May 1997, Mr PM Mahalingam filed an ex parte summons in chambers in encl 50 supported by an affidavit affirmed by Mr PM Mahalingam on the same day as reflected in encl 49. The title of encl 50 was worded thus: E

Guaman Sivil No 22–257 tahun 1996
(Usul Pemula No _____ tahun 1997)

Antara

Dato' Wong Gek Meng ... Plaintif/Pemohon F

Dan

(1) Pathmanathan a/l Mylvaganam
(2) Gan Techiong
(3) M Sakamoto
(4) Makoto Togase ... Defendan-Defendan/ Penentang-Penentang G

Enclosure 50 sought for the following prayer:

> (a) Untuk kebenaran dari Mahkamah untuk mengubah/mengganti tajuk kes ini dari Guaman Sivil No 22–257–1996 kepada Usul Pemula No ____ tahun 1997 H

and it was fixed for hearing on 30 May 1997 in chambers.

On 30 May 1997, in open court, Mr Jayabalan from Messrs Gana Muthusamy & Co stressed that his presence was due to the fact that encl 44 was served on them. Again Mr Jayabalan stressed that Messrs Gana Muthusamy & Co, represented the defendants in Civil Suit No 22–257–1996, namely Dato' Wong Gek Meng, Wong Geok Cheong, Supertex Industries Sdn Bhd and Supertex Mfg Sdn Bhd — and nothing I

A else. Mr PM Mahalingam introduced himself as counsel for encll 50 and 41; he too said he was present for encl 44. Upon hearing the existence of encl 50 scheduled for hearing in chambers on that day (30 May 1997), Mr Yusof Khan remarked that 'we have no inkling of encl 50, surreptitiously filed, which was filed without our knowledge'. Mr Yusof Khan further said
B that encl 41 was Mr PM Mahalingam's application — a stranger to the cause. Mr M Pathmanathan submitted that encl 44 was his application and he would confine himself to prayers (a) and (c) thereof.

On the question of whether encl 44 ought to be heard in open court, the parties seemed to agree that the discretion was entirely mine to make. Order 32 r 11(1) of the RHC states that:

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> The Judge in Chambers may direct that any summons, application or appeal shall be heard in Court or shall be adjourned into Court to be so heard if he considers that by reason of its importance or for any other reason it should be so heard.

D In plain and clear language O 32 r 11(1) of the RHC gives me an unfettered discretion more in the nature of a carte blanche to decide whether encl 44 shall be heard in open court by reason of its importance or for any other reason. It is certainly important to hear encl 44 in open court together with encl 41 because encl 44 is related to encl 41. Moreover, both enclosures have been fixed for hearings on the same day. It is
E convenient to proceed to open court to dispose both these two enclosures (encll 44 and 41) simultaneously. But once encl 44 is adjourned to the open court it is said that 'the matter is in court for all purposes and is open to the press' (*Hardie and Lane v Chiltern* (1927) 43 TLR 477). *Canopee Investment Pte Ltd & Ors v Landmarks Holdings Bhd & Ors* [1989] 2 MLJ 469 concerned an oral application for the matter to be adjourned from
F open court back into chambers. This was what Shankar J (as he then was) said in that case (at p 470):

> This is probably why O 32 r 11 is open-ended. It enables the court to decide what is to be done in the interests of justice in each case.

G In *Sinnathamby & Anor v Lee Chooi Ying; Brijkishore & Anor v Lee Chooi Ying* [1987] 1 MLJ 110, the (then) Supreme Court took cognizant of the fact that the trial judge directed the respondent's summons in chambers to be heard in open court under O 32 r 11(1) of the RHC and the order as extracted showed that it was an order pronounced in open court. Since it was an order in open court, Mohd Azmi SCJ held the view that for the
H purpose of bringing an appeal, the requirements of s 68 (2) of the Courts of Judicature Act 1964 which was in relation to an order made in chambers need not be complied with. It is pertinent to note that the trial judge's discretion to order the summons in chambers to be heard in open court was not questioned at all.

I It is beyond peradventure that the discretion accorded in O 32 r 11(1) of the RHC must be exercised according to common sense and justice. It must be a judicial discretion 'and not the mere whim or caprice of the person to whom it is entrusted on the assumption that he is discreet' (*Lee v Bude, etc Ry* (1871) LR 6 CP 576 at p 580, per Willes J). It is also

of great interest to read *Universal Cargo Carriers Corp v Citati* [1957] 1 WLR 979 and *Annison & Ors v District Auditor for St Pancras Borough Council & Anor* [1962] 1 QB 489. Perhaps it is not out of place to cite the sage words of Devlin LJ in *Berry v British Transport Commission* [1962] 1 QB 306 especially at p 326 to the following effect:

> ... The court has no power of its own motion to declare how the discretion conferred by a statute shall be exercised or to lay down rules about it. It derives its power from the statute itself according to the construction which it puts upon it — 'construction' being a word that embraces not only the interpretation of the words used but also the ascertainment of the true intent of the statute, considered in relation to the branch of the law with which it is dealing ... . It is the intent of every statute which confers a discretionary power that the power should be used justly.

In my judgment, this is a fit case for encl 44 to be heard in open court and an order to that effect was accordingly made. Having made that ruling, I ordered encll 44 and 41 to be heard simultaneously. This prompted Mr PM Mahalingam to say that he wanted encl 50 to be heard in chambers first. In rebuttal, Mr M Pathmanathan submitted that it was not fair to his clients as encl 50 was filed surreptitiously. He submitted, and I wholeheartedly agree, that encl 50 was solely meant to pre-empt encl 44 especially prayer (a) thereof. He submitted that Mr Jayabalan from Messrs Gana Muthusamy & Co, the solicitors on record for Dato Wong Gek Meng, Wong Geok Cheong, Supertex Industries Sdn Bhd and Supertex Mfg Sdn Bhd, did say that they were not involved in encll 41 and 50. Incidentally, Mr Jayabalan confirmed this and this prompted Mr M Pathmanathan to submit that Mr PM Mahalingam from Messrs PM Mahalingam & Co were not solicitors on record notwithstanding the fact that encll 41 and 50 were filed by them.

It is obvious that when Mr PM Mahalingam filed encl 50 on 23 May 1997, it was done as an afterthought. When this court heard submissions in regard to encll 44 and 41 on 17 May 1997 which finally was adjourned to 30 and 31 May 1997, Mr PM Mahalingam realized the importance of prayer (a) to encl 44. Precisely put, Mr PM Mahalingam knew that prayer (a) of encl 44 would extinguish and put an end to encl 41 forever. To circumvent it, Mr PM Mahalingam filed encl 50 solely to pre-empt encl 44. To me, that was a conduct unbecoming of a member of the Bar. I do not propose to say anything more. I then proceeded to hear submissions in open court for encll 44 and 41 simultaneously.

Mr M Pathmanathan argued that the title to the action as reflected in encl 44 remained and cannot be changed except by an order of this court and made under O 15 of the RHC. He submitted that the title of the action comprised the name of the High Court, the number of the action, the parties to the action being Yukilon Manufacturing Sdn Bhd and Yukigaya Chemical Industry Co Ltd as the plaintiffs and the defendants being Dato' Wong Gek Meng, Wong Geok Cheong, Supertex Industries Sdn Bhd and Supertex Mfg Sdn Bhd. He then referred me to encl 41 and he submitted that the name of the court remained the High Court Johor Bahru, the suit number remained the same but the parties have changed.

A The first defendant in encl 44 became the plaintiff in encl 41. He wondered, rightly so, whether the Dato' Wong Gek Meng JP in encl 41 was the same individual named as the first defendant in encl 44 because of the usage of the initial 'JP'. He submitted that Dato' Wong Gek Meng JP had usurped the original plaintiffs in encl 44. He submitted that in encl 41 he found himself together with Gan Techiong, M Sakamoto and Makoto Togase as B defendants. He submitted with vigour and vitality that re-structuring the names of the parties was unprecedented in the annals of legal history. He rightly submitted that court proceedings are governed by the RHC and the players must play within the rules. This was not offside but rather outside the rules so submitted Mr M Pathmanathan.

C I was referred to the case of *Sykt Joo Seng & Anor v Habib Bank Ltd* [1986] 2 MLJ 129 (SC) where there was a failure to apply to the court or a judge for leave to enter judgment against the appellants. That failure caused the judgment to be an irregular judgment obtained in direct contravention of the RHC. The appellants were therefore entitled ex debito D justitiae to have the default judgment set aside. On the facts, *Sykt Joo Seng & Anor* are poles apart and cannot be on all fours with the present case. The mistake in that case was not as glaring as the present case. The facts in the present are indeed peculiar and certainly far more serious than *Sykt Joo Seng & Anor*. It is apparent that Mr PM Mahalingam has distorted the whole action and changed the status of the parties without an order of E court. That was quite blatant and without such leave, encl 41 was filed. That was wrong.

This was a case of changing the character of one suit to that of another without an order of the court. This was a classical case where the RHC was thrown to the wind. To overcome encl 41 would be to strike it F out in limine. The court was not concerned at all as to how to rectify encl 41. That would not be the domain of the court. I am to say that he who changes the character of the proceedings without an order of the court must bear the brunt of judicial indignation. He who changes the character of the proceedings must do so at his own peril. In my judgment, encl 41 has no place in these proceedings and it must be expunged or struck out G forthwith. On record, Messrs Gana Muthusamy & Co remained as solicitors for the defendants in encl 44 and their representative categorically disclaimed connection with encll 41 and 50. The plaintiffs in encl 44 recognized Messrs Gana Muthusamy & Co, as the solicitors on record and it was for that reason that encl 44 was served on them.

H Mr M Pathmanathan reiterated the significance of O 64 r 1(1) of the RHC. It was his submission that the language employed in the said order was so plain that no authority was required to support it. Order 64 r 1(2) of the RHC states that the notice of a change of solicitor in Form 138 must be filed in the Registry. Till the date of the hearing (30 May 1997), Messrs Gana Muthusamy & Co remained as solicitors for Dato' Wong Gek Meng, I Wong Geok Cheong, Supertex Industries Sdn Bhd and Supertex Mfg Sdn Bhd. Mr PM Mahalingam has yet to file Form 138 to show to this court that he has taken over the affairs of the defendants in encl 44 from Messrs Gana Muthusamy & Co. The failure to file Form 138 by

Mr PM Mahalingam prompted Mr M Pathmanathan to comment, perhaps somewhat injudiciously to the following effect. Who is Messrs PM Mahalingam & Co who intrudes into this action? It would be incongruous, unsuitable, inappropriate and absurd for Messrs Gan & Lim to serve all the documents on Messrs PM Mahalingam & Co who were not on record as the solicitors for the first defendant in encl 44. Without filing Form 138, Messrs PM Mahalingam & Co acted without locus standi and had no standing at all in these proceedings. Indeed, in these circumstances, it would be inappropriate to allow Mr PM Mahalingam to submit before this court. Nevertheless, in the interest of justice, I allowed Mr PM Mahalingam to address the court. Enclosure 41 which restructured the title to the action went to the root of the matter and it should rightly be struck down as a nullity. I venture to say that the mere filing of encl 41 by a solicitor not properly on record would render it defective. The RHC sets out the perimeters of court proceedings and all advocates and solicitors should bring themselves within the ambit and purview of it lest they fall from grace. A complete stranger to the action will never be accorded locus standi. A busybody who interferes in these proceedings too will not be accorded right of hearing. To reject encl 41 at this stage would mean to prevent abuse by busybodies, cranks and other mischief-makers and it would also serve as a warning to other members of the Bar not to interfere unless they follow strictly the rigours of the RHC. Always mindful of the full import and purport of the case of *Insas Bhd & Anor v Ayer Molek Rubber Co Bhd & Ors*, judicial temperament of the highest order was exercised and, consequently, I did not let my indignation at the conduct of Mr PM Mahalingam in restructuring encl 41 carry me away. I decided only on the facts and nothing else.

An argument was advanced that the procedure adopted in encl 41 followed closely that of *Attorney General, Malaysia v Manjeet Singh Dhillon*. This was certainly misleading. There it went by way of a civil application whereas in encl 41 it borrowed an existing civil suit number and changed the parties thereto. It is interesting to note that in the case of the *Malaysian Bar v Tan Sri Dato Abdul Hamid bin Omar* [1989] 2 MLJ 281 (SC), it went by way of a civil application using a different number with different parties.

In regard to costs that was sought for in encl 44 prayer (c), Mr M Pathmanathan submitted that that was entirely my discretion and he urged me to hold Mr PM Mahalingam personally liable to pay the costs. The discretion to grant costs must be exercised judicially and according to the rules of reason and justice. It must not be motivated by private opinion (*Susannah Sharp v Wakefield & Ors* [1891] AC 173), nor benevolence (*Kierson v Joseph L Thompson & Sons Ltd* [1913] 1 KB 587), nor sympathy (*Bevington v Perks* [1925] 2 KB 231). The discretion to grant costs must, by necessity, be justifiable (*Ritter v Godfrey* [1920] 2 KB 47). In my judgment, there are materials available in the present case for me to exercise that discretion in awarding costs to the successful party, namely the plaintiffs in encl 44 (*Civil Service Co-operative Society v General Steam Navigation Co* [1903] 2 KB 756 (CA)) without having to hear fresh viva voce evidence for the purpose of determining costs (*Mayor*

A *of Bristol v GW Ry* (1916) WN 47). In arguing that Mr PM Mahalingam should be ordered to pay the costs personally, Mr Yusof Khan referred me to the decision of the (then) Supreme Court in the case of *Karpal Singh v Atip bin Ali* [1987] 1 MLJ 291 where Seah SCJ (as he then was) in a short judgment observed that (at p 292):

B

> The first thing to remember is that an advocate and solicitor is an officer of the court and that his professional conduct is always under the supervision and scrutiny of the court. It follows that when there is dereliction of duty on the part of an advocate and solicitor in the conduct of his professional work, the court may, in a proper case, order him to be personally liable for the costs of the proceedings after giving him an opportunity to defend himself.

C

> In the High Court below, after the learned judge had struck out the civil suit, Karpal Singh (the second defendant), appearing in person applied for the costs of the action to be borne by Karam Singh, learned counsel for the plaintiff, personally. The learned judge declined to make such an order. On appeal, Karpal Singh argued that the learned judge had failed to exercise his discretion judicially. It was submitted that after finding the civil suit

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> brought by the plaintiff to be 'conspicuously unmaintainable' and in the absence of any explanation given by Karam Singh, the learned judge should have acceded to the application. We think the learned judge had misconstrued the principle laid down by the House of Lords in *Myers v Elman* [1940] AC 282 explained by Sachs J in *Edwards v Edwards* [1958] P 235 and followed by the then Court of Appeal in the case of *Mitra & Co v Thevar & Anor*

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> [1960] MLJ 79. In our opinion, having come to the conclusion that the civil suit filed by the plaintiff was 'conspicuously unmaintainable' and having rejected the explanation given by Karam Singh, we think that this was a proper case where the learned judge ought to have exercised his discretion and ordered that the costs of the proceedings be paid by Karam Singh, the lawyer, personally. We therefore allow the appeal and amend the order of

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> the learned judge by adding the words that 'Karam Singh, do repay to the plaintiff, costs which the plaintiff has been ordered to pay to Karpal Singh, the second defendant, under O 59 r 8(2)(b) of the Rules of the High Court 1980'. Costs of the appeal to the appellant to be paid by Karam Singh personally. Deposit to be refunded to the appellant.

G It seems that the rationale for ordering the solicitor to pay personally the costs incurred therein was 'not to punish the solicitor but to protect and compensate the opposite party' (per Sachs J in *Edwards v Edwards* [1958] P 235 especially at p 247 of the report).

Mr Yusof Khan argued forcefully that Mr PM Mahalingam should be made to bear the costs personally as there was dereliction of duty on his

H part. Mr Yusof Khan rightly pointed out that Mr PM Mahalingam had admitted his mistake in filing encl 41. That mistake was said to be so fundamental that it became conspicuously unmaintainable to allow encl 41 to exist. This was said to be the dereliction of duty on the part of Mr PM Mahalingam for which he must pay.

I Mr PM Mahalingam knew that he was going on an uphill task. He submitted that he was the senior counsel while Messrs Gana Muthusamy & Co remained on record as the solicitors for the defendants in encl 44. But unfortunately, the assertion that he was the senior counsel was not

supported by Mr Jayabalan from Messrs Gana Muthusamy & Co. Indeed, if what Mr PM Mahalingam said was true, encl 41 could and should be filed by Messrs Gana Muthusamy & Co. It is ironical that Mr Jayabalan disclaimed connection with not only encl 41 but also encl 50. What is more surprising was this. Mr PM Mahalingam admitted that he fell in error and that it was entirely his mistake when he filed encl 41 in the way he did. Mr PM Mahalingam submitted that he had served encl 41 but this was challenged by Mr Gan Techiong who said that he paid a praecipe of RM35 to obtain encl 41 from the court. Notwithstanding his own mistake in filing encl 41, Mr PM Mahalingam had the audacity to ask this court to order that costs be incurred by Mr M Pathmanathan, Mr Gan Techiong, M Sakamoto and Makoto Togase.

An affidavit of Mr PM Mahalingam in encl 49 in support of encl 50 particularly at para 6 thereof blamed the court staff for the error in numbering encl 41 as Civil Suit No 22–257–1996. Mr PM Mahalingam submitted that para 6 was in error and he was apologetic about it. In fact, in para 10 of encl 49, Mr PM Mahalingam tried to convey an apology worded in poor Bahasa Malaysia. It was worded this way:

> Saya berduka cita kerana sebab-sebab yang tidak disengajakan kepada mahkamah yang mulia ini.

But on record, para 6 of encl 49 remained as solemn testimony of the blame levelled at the court staff. Mr PM Mahalingam did not seek to amend the offending paragraph by filing a corrective affidavit. It is a sad day for the judiciary if counsel comes to court and blame the court staff for counsel's own mistake. A mistake by counsel be it intentional or otherwise, be it in regard to imprecise drafting or otherwise must be shouldered by the counsel alone. It is pointless to shift the blame to others. Having admitted the mistake, Mr PM Mahalingam submitted that this court could convert encl 41 to an originating motion. This prompted Mr M Pathmanathan to argue that this court ought not to reward Mr PM Mahalingam for his mistake. I agree entirely with this submission.

For the reasons adumbrated above, I granted the prayers sought for in encl 44 especially prayers (a) and (c). I felt that Dato' Wong Gek Meng should pay the costs, on a full indemnity basis, to the plaintiffs, namely Yukilon Manufacturing Sdn Bhd and Yukigaya Chemical Industries Co Ltd. It was for this reason that prayer (c) of encl 44 was acceded to.

Before proceeding to hear encl 50, I had another matter to consider in open court. That was Civil Suit No 22–224–1993 between Setialand Realty Sdn Bhd as the plaintiff and Tou Yeou Mou and another as the defendants. Having disposed of that matter, I proceeded to hear encl 50. I directed that encl 50 be served on Messrs Gan & Lim. This was duly complied with. All parties agreed that though encl 50 was scheduled to be heard in chambers, it should instead be heard in open court. On this concession, I ordered encl 50 to be heard in open court. Mr Yusof Khan proceeded to submit and he informed the court that since Mr PM Mahalingam refused to withdraw encl 50, he would put Mr PM Mahalingam on advance notice that the court will be moved to order Mr PM Mahalingam

to pay the costs in the event encl 50 was dismissed with costs. Mr Yusof Khan rightly pointed out that encl 50 was conspicuously unmaintainable. He argued that the title to encl 50 was in error. The title still recited Civil Suit No 22–257–1996 and the parties thereto were listed as the same parties as in encl 41. However, my attention was drawn to an absence of the initial 'JP' after the name of Dato' Wong Gek Meng in encl 50 as compared to encl 41. Just like encl 41, encl 50 was filed by Messrs PM Mahalingam & Co — the solicitor that was not on record. He submitted that on these grounds, encl 50 should be dismissed with costs. On hearing the submissions advanced by Mr Yusof Khan, Mr PM Mahalingam quickly withdrew encl 50. Since Mr Yusof Khan decided not to press for costs, I ordered encl 50 to be struck out without costs. In an unprecedented move, Mr PM Mahalingam has filed an appeal against my order in striking out encl 50 without costs notwithstanding the fact that he had withdrawn encl 50.

Order accordingly.

Reported by Lew Chee Seong